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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the
case.

APPELLANT PRO SE:

WENDELL IDDINGS
Carlisle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WENDELL IDDINGS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 06A04-0606-CR-305
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0005-CF-45

October 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Wendell Iddings, *pro se*, appeals the denial, without hearing, of his “Motion To Compel Attorney To Deliver Over Money.” (App. at 5.) We reverse and remand.¹

In 2000, Iddings hired attorney Darren Todd Cole to represent him in a criminal matter and paid Cole a retainer and investigative fee. Cole withdrew his appearance prior to trial and another attorney represented Iddings at trial. Iddings was convicted. We affirmed his conviction and sentence. *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 700 (Ind. 2002).

In 2006, Iddings wrote Cole and requested his money be returned. Cole declined, asserting he had earned the fee. Iddings then filed a motion to compel Cole to return the unearned portion of the retainer and investigative fee under Ind. Code § 33-42-1-9, which provides:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney’s professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

The trial court determined Iddings’ motion “should be and therefore is summarily denied.” (App. at 15.) This was error.

¹ No brief responding to Iddings’ appeal was filed in this cause. We granted the State’s Motion to Withdraw. Accordingly, we apply a less-stringent standard of review with respect to showings of reversible error. *Conklin v. Fisher*, 803 N.E.2d 693, 694 (Ind. Ct. App. 2004). We may reverse if the appellant can establish *prima facie* error. *Id.* *Prima facie*, in this context, is defined as “at first sight, on first appearance, or on the face of it.” *Id.*

An attorney may not retain the unearned portion of an advance fee. *See* Ind. Professional Conduct Rule 1.16(d) (upon termination of representation a lawyer is required to refund to the client “any advance payment of fee or expense that has not been earned or incurred”). As a result, a trial court does not have the discretion to summarily deny a request for the unearned portion of a retainer fee. *Ferguson v. State*, 773 N.E.2d 877, 880 (Ind. Ct. App. 2002); *see also Johnson v. State*, 762 N.E.2d 222 (Ind. Ct. App. 2002) (request for documents), *reh’g denied*; *McKim v. State*, 528 N.E.2d 484 (Ind. Ct. App. 1988) (same). When a motion to compel the delivery of money or papers is presented, the trial court should provide reasonable notice to the attorney, hold a hearing on the matter, and then rule on the motion. *Smith v. State*, 426 N.E.2d 402, 404 (Ind. 1981).

We conclude the trial court erred in summarily denying Iddings’ motion. On remand, a hearing will be necessary to determine what portion of the retainer fee, if any, Iddings is entitled to have refunded. *See Ferguson*, 773 N.E.2d at 881. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

BAILEY, J., and RILEY, J., concur.